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CASES AND AUTHORITIES CITED.

(No. 28,227.)

In the Supreme Court of the United States

OCTOBER TERM, 1921

In Equity. No. 870.

THE STATE OF TEXAS, APPELLANT.

vs.

EASTERN TEXAS RAILROAD COMPANY ET AL., APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

INTRODUCTORY STATEMENT.

This is an appeal from an order dissolving the temporary injunction and also from a final decree of the district court, Western District of Texas, in a proceeding instituted by the State of Texas as a sovereign State in the Fifty-third Judicial District Court of the State of Texas and removed to the Federal court upon motion by defendants. The proceeding was to restrain the Eastern Texas Railroad Company, its officers and attorneys, from abandoning operation of its trains and from dismantling its road. Temporary injunction was granted by the Hon. George Calhoun, judge, on the 9th day of July, 1920, restraining defendants from abandoning the main line of defendants' road and from ceasing to carry

passengers and freight in intrastate commerce, and upon removal of the cause by order dated the 9th day of October, 1920, the temporary injunction remained in effect until order and decree appealed from, dated the 17th day of March, 1921, at which time plaintiff took an appeal from the order to the Supreme Court of the United States and upon motion obtained an order, dated April 25, 1921, from this court restraining defendants from dismantling its road and disposing of its properties pending the appeal. Defendant ceased operation on May 1, 1921, but has, so far as plaintiff is advised, kept its property intact in accordance with the order of this court referred to.

The case involves the construction and the constitutionality of the Transportation Act of 1920, and particularly of Section 1 thereof and of subdivisions (18), (19), (20), (21) and (22) of said Section 1, giving the Interstate Commerce Commission power and authority to grant a certificate of public convenience and necessity authorizing and directing construction and abandonment of railroads and their operation wholly within a State.

A question of jurisdiction was also raised, but not passed upon by the court, the contention being by the defendants that the court did not have jurisdiction to hear the case because the suit was not instituted in the United States District Court, wherein one of the petitioners before the Interstate Commerce Commission resides, as is provided by the Act of 1913 abolishing the Commerce Court and giving jurisdiction to the Federal district courts.

The defendant, the Eastern Texas Railroad Company, is incorporated under the laws of the State of Texas of date November 8, 1900, and is to exist for a period of twenty-five years. Its purpose, as stated in its charter, was to construct, own, maintain and operate a line of railroad from Lufkin, Texas, to Crockett, Texas, passing through Angelina, Trinity and Houston counties. After this suit was instituted and on December 2, 1920, it obtained an order from the Interstate Commerce Commission, denominated

a certificate of public convenience and necessity, authorizing and directing it to abandon operation of trains and dismantle and dispose of its tracks. The road is wholly within the State of Texas, and is located within the bounds of the district court for the Eastern District of Texas.

Bill of Complaint.

The original bill filed in the State court on July 9, 1920, complained of the defendant, the Eastern Texas Railroad Company, and of E. B. Perkins, F. W. Green, Daniel Upthegrove and E. J. Mantooth, alleging that they were conspiring together to abandon operation of trains and to dismantle the road in violation of the Constitution of Texas, and of an act of the Legislature in effect since April 8, 1889, forbidding the abandonment of operation and the removal of main line tracks of railroads in Texas. It also alleged matters restated in the supplemental or amended bill filed after the case was transferred to the Federal court. An injunction was obtained in the State court as prayed for, and thereafter the cause was transferred upon motion of the defendants to the United States District Court, Western District of Texas. The original bill was filed, the temporary injunction was granted, and the transfer made to the Federal court long prior to the issuance of the certificate of public convenience and necessity by the Interstate Commerce Commission to the Eastern Texas Railroad Company authorizing and directing it to abandon operation of its trains and dismantle its tracks.

On January 15, 1921, the State of Texas filed its supplemental bill of complaint, in which was alleged the charter contract between the State of Texas and the Eastern Texas Railroad Company, the Constitution and statutes of the State of Texas, and particularly the Act of April 8, 1889, were pleaded in bar of the defendants' right to abandon operation of the trains and dismantle the track. It is alleged that the railroad consists of thirty and

three-tenths (30.3) miles, situated wholly within the State of Texas; that it obtained its charter as a common carrier with all the rights and privileges of receiving passengers and freight for transportation and charging rates and fares therefor, with the right of interchange of traffic between it and connecting carriers and with the right of eminent domain; that it was also subject to the laws of the State of Texas and to the rules and regulations of the Railroad Commission of the State of Texas.

It is alleged that on the 28th day of August, 1906, the defendant railroad company sold its net current assets and its rolling stock to the Louisiana & Texas Lumber Company, and that on September 1, 1906, the St. Louis Southwestern Railway Company, a Missouri corporation, acquired the entire capital stock of the Eastern Texas Railroad Company, and still owns same, except qualifying shares owned by its board of directors; that since that date the Eastern Texas Railroad Company has ceased to exist as a separate entity, but has been owned and controlled and operated by the purchaser of its capital stock, having substantially the same officers and directors; it is further alleged that thereby the Eastern Texas Railroad Company became a part of the system known as the St. Louis Southwestern Railway Company, comprising 810.50 miles in the State of Texas and a total of seventeen hundred and fifty-three and eighty-three hundredths (1753.83) miles in the United States; it is also alleged that up to and including the year 1917 the defendant railway company earned and received a substantial net corporate income and accumulated a surplus and profit account, but that it deferred its maintenance and permitted its properties to run down, expending no substantial portion of its income for maintenance and betterment; it is further alleged that if it be true, as claimed by the railroad company, that it did not earn its profit for the years since 1917, that same was because of the war conditions and because of the conditions of reconstruction, and that it would within a reasonable time pay operating

expenses and again make a profit for its owners; it was also alleged that it owed no debts and was financially able to make the needed repairs and carry on its operations.

The sovereignty of the State of Texas was pleaded with a claim of its right to create and control private corporations and particularly private corporations engaged in the business of common carriers, the property of which was wholly within the State; denying to Congress the authority to determine questions of law, either directly or through the Interstate Commerce Commission, and to adjudicate the rights of the State of Texas and authorize the abandonment of the Eastern Texas Railroad Company under the Constitution of the United States by claiming the right thereunder to have such matters adjudicated in the Supreme Court of the United States with the State of Texas as the proper party. It was also alleged that the State of Texas, in the exercise of its sovereign rights, had adopted a State Constitution in 1876, and in pursuance of its provisions has enacted laws for the regulation and control of common carriers within the State, completely protecting the rights of such carriers and also the rights of the State of Texas; that such laws were in effect at the time the Eastern Texas Railroad Company received its charter and have since continued to be in effect and enforced. Among the provisions and enactments was that forbidding the abandonment of operation of trains and dismantling of its tracks. It was alleged that certificate of public convenience and necessity ordered and decreed by the Interstate Commerce Commission and upon which defendant relies was (a) beyond the power which it could constitutionally exercise; (b) beyond its statutory powers; (c) confiscatory of the contract rights of the State of Texas embraced within the charter of the defendant and the several statutes and the Constitution of the State of Texas, which constituted a part of the same, and in violation of the Fourteenth (14th) Amendment of the Constitution of the United States; (d) that the granting of such certifi-

cate was without evidence or without sufficient evidence in law to support the same, and arbitrary and unjust and that the Commission, in granting the same, exercised its authority in such an unreasonable manner that the granting of the same was and is void; (e) that the granting of such certificate was against the evidence before the Commission; was and is contradictory to the actual findings of fact made by the Commission itself, though said findings of fact are more restrictive and more favorable to the defendant than the evidence would warrant. For all of these reasons it was alleged that the certificate of public convenience and necessity is null and void.

THE ANSWER.

One answer was filed for all of the defendants admitting the incorporation of the Eastern Texas Railroad Company, and the residence of the other defendants as alleged, but denying the provisions of the law of the State of Texas, explaining with such denial their contention that the Constitution and laws of Texas had been superseded by the laws enacted by the Congress of the United States regulating interstate commerce and particularly pleading Section 1 of the Transportation Act of 1920, raising the issue as to the effect of the Interstate Commerce Act, with its several amendments upon the State statutes and as to which is paramount as applied to the defendant railroad company and the questions involved. The defendant admitted its intention to abandon operation of its entire line of railway, provided a certificate of public convenience and necessity should be granted by the Interstate Commerce Commission upon its application then pending.

Defendants deny the allegations in plaintiff's bill of complaint to the effect that in accepting and exercising the power and authority conferred upon it by its charter, the Eastern Texas Railroad

Company obligated itself as alleged, and entered into such contract with the State of Texas as alleged, and says it had no power to do so but relied upon and pleaded the provisions of the Transportation Act of 1920 and the authority of Congress under the Constitution to regulate commerce.

Defendants affirmatively allege that the line of railroad in question was originally built for the purpose of hauling products from a large saw mill and manufacturing plant near Kennard, alleging that the plant depended for its operation upon timber which it could procure in the territory adjacent and contributory to said plant and that said timber has been cut out and manufactured and the products thereof shipped out and said mill dismantled and removed, since which time there is not sufficient traffic over said line to pay its operating expenses and its maintenance and necessary upkeep; that it has no funds upon which to operate and could obtain none, all of which was alleged in its application to the Interstate Commerce Commission which it attached as an exhibit, making same a part of its answer. Defendants denied the authority of the court to issue the injunction and prayed for its dissolution.

On December 18, 1920, the defendant filed a supplemental answer to which they attached the certificate of public convenience and necessity, authorizing the abandonment of the road, dated December 2, 1920, again attacking the authority of the court to issue injunction and praying for its dissolution. There is no denial of the ownership by the St. Louis Southwestern Railway of the stock of the Eastern Texas and the identity of officers as alleged by plaintiff.

Petition for Removal.

On October 4, 1920, the defendants filed a motion with the district court of the Fifty-third Judicial District of Texas, asking

removal of the cause, alleging that the action arose under the Constitution and laws of the United States. They presented a removal bond and prayed that it be removed to the United States District Court for the Western District of Texas.

Order of Removal.

Thereafter, on October 19, A. D. 1920, the Honorable George Calhoun, judge of the district court of the Firty-third Judicial District of Texas, entered his order in compliance with defendants' prayer, removing said cause to United States District Court for the Western District of Texas.

Motion to Dissolve Injunction.

On December 18, 1920, defendants filed the motion to dissolve the temporary writ of injunction. A dissolution of the injunction was sought on the ground that the Acts of Congress were paramount and superseded the Constitution and laws of the State of Texas; that the matters of fact pleaded in the original answer and supplemental answer of defendants in reply thereto, in denial of, and in explanation of the allegations contained in the bill, alleging that plaintiff did not, at the time of filing this suit, have any cause of action against the defendants, or either of them, authorizing the issuance of writ of injunction; that Congress has, under the power given it to regulate commerce, the authority to authorize the Interstate Commerce Commission to grant the certificate of public convenience and necessity alleged.

In its supplemental motion to dissolve the injunction filed on March 15, 1921, defendants pleaded their acts in good faith under the Transportation Act of 1920; the order issuing the certificate of public convenience and necessity and their compliance therewith and praying, as in its original motion, that temporary injunction be dissolved.

Decision of the District Court.

The court found that upon the motion to dissolve the injunction two issues had been raised by the pleadings and argument of counsel, the first being that the acts of the Interstate Commerce Commission in attempting to exercise the functions and duties imposed upon it by the Transportation Act and particularly that which authorized said commission to take cognizance of applications for the dismantling and abandonment of railroad properties, are unconstitutional because in such acts Congress had attempted to confer power upon the Interstate Commerce Commission, which was not within the contemplation or the meaning or interpretation of the original constitutional enactment, conferring power upon Congress to regulate commerce.

The second question raised was whether or not the State should have proceeded under the Act of 1913, known as the act abolishing the commerce court and conferring jurisdiction upon the district courts, to file a proceeding in the district wherein the petitioners before the Interstate Commerce Commission, or one of them, reside, to have the order of the Interstate Commerce Commission set aside.

A reveiw was then given in a general way of the tendency of legislation by Congress claiming for it additional power from time to time under this provision of the Constitution and also the holdings of the court thereon. The court observed that there is no authority, so far as the decision of the courts are concerned, for the exercise of such power by Congress, but gave as an opinion that the Supreme Court would in its decree attribute to Congress this power, though not heretofore claimed and exercised by it. The motion was therefore sustained upon the theory of defendants' contention that the findings and order of the Interstate Commerce Commission were not subject to collateral attack.

The second question was not passed upon by the court because

his holding upon the first question was such as to eliminate necessity for a decision upon the second—in passing upon the question the court assumed jurisdiction.

Evidence was then tendered upon the issues raised by the pleadings, but the court declined to hear the evidence offered by plaintiff, and found for the defendants, adjudging all costs against plaintiff.

From the court's order, dissolving temporary injunction, and from its decree, appeal was duly taken and allowed to the Honorable Supreme Court of the United States.

Claim of Appeal.

Upon the decision of the court being announced, plaintiff in open court gave notice of appeal and thereafter on April 2, 1921, filed its formal petition or claim of appeal direct to the Supreme Court of the United States, which claim was allowed by the court.

Errors Assigned.

On April 2, 1921, plaintiff filed its assignments of error.

The first error claimed is that the records on their face show that no consideration should be given to the certificate of public convenience and necessity issued by the Interstate Commerce Commission on December 2, 1920, and pleaded by defendants.

The second error claimed is to the ruling of the court in refusing to permit plaintiff to introduce the evidence showing and tending to show that the findings of the Interstate Commerce Commission were untrue, arbitrary, unreasonable and unjust and without evidence to support it and contrary to the law and evidence.

The third error claimed complains of the ruling of the court in holding that Subdivisions (18), (19), (20), (21) and (22) of Section 1 of the Transportation Act, approved February 28,

1920, were constitutional, and that the law was with the defendants in said cause.

The fourth claim of error complained of the ruling of the court in interpreting Subdivisions (18), (19), (20), (21) and (22) of Section 1 of the Transportation Act, approved February 28, 1920, so as to grant the Interstate Commerce Commission authority to order the Eastern Texas Railroad Company to abandon operation and dismantle its property contrary to the laws of the State of Texas and contrary to its charter contract.

STIPULATION.

On the 4th day of April, 1921, stipulation agreed to by attorneys on both sides setting forth and agreeing to what should constitute the record on appeal was duly filed with the clerk and thereupon the record was prepared and forwarded to the Supreme Court of the United States on the 13th day of April, 1921, under equity No. 870, file No. 28277.

THE TRANSPORTATION ACT AUTHORIZING THE INTERSTATE COMMERCE COMMISSION TO GRANT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY DOES NOT EXCLUDE THE AUTHORITY OF THE STATE.

A proper interpretation of paragraphs (18), (19), (20) and (21) of Section 1 of the Transportation Act does not exclude the authority of the State, but only directs the Interstate Commerce Commission to grant its authority, under conditions to be prescribed by it, for the withdrawal by the carrier from engagement as an interstate carrier.

In this connection we call attention to the language employed by Congress in the Transportation Act, which appellees contend excludes the authority of the State:

"From and after issuance of such certificate, and not before, the carrier by railroad may, *without securing approval*

other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby." (Paragraph (20), of Section 1.) (Italics ours.)

In order to properly understand the meaning of this language, it is necessary to discuss the principle of the act and the purpose for which it was enacted.

The United States had taken charge of the railroads of the country and operated same to meet the emergencies of the war. Unusual legislation had been passed which could be held constitutional only on the ground that an emergency demanded it. The roads are now to be turned back to the owners. The theory asserted itself in Congress that the roads were in a weak and helpless condition, and in order to sustain them it would be necessary for the government to extend a helping hand. The Interstate Commerce Commission was delegated to perform this service. It was authorized, under its interpretation of the act to divide the country into such number of groups as it may see fit and fix such rates as may be necessary for passengers and freight as would bring to all of the railroads within the group a specified return on the valuations found for all the carriers. Thus was linked together the entire system, and Congress foresaw that in order to foster and protect the carriers, it would be necessary to make immediate extensions and connections. Provisions were made by Congress to aid in financing such extensions in order that certain helpless carriers may have their lines extended, that they may perform fully the service and realize to the fullest extent the income available to it. At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would

not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized. Let us look to this act and other acts of Congress for its interpretation.

Paragraphs (18), (19) and (20) provide alike for the extension and abandonment by carriers of their lines. If the language used in these paragraphs is complete and sufficient to exclude the State from any authority in the abandonment of the road, it is likewise sufficient to exclude such authority in the extension by a carrier of its line. Congress was not satisfied, however, to stop here, for it may be necessary to extend the line in order to properly foster and properly regulate interstate commerce, and to this end paragraph (21) was added, giving to the Commission power to authorize or require carriers to provide themselves with adequate facilities or to extend their line or lines, making provision for the enforcement of such order. Section (21) has no application to abandonments, but solely to extensions.

Under the authority given, it may be stated that the power of the State to forbid extensions has been superseded. It may be, with good reason argued also, that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this given as a reason for the insertion of paragraph (21). If that same argument applied to abandonments, Section (21) should then have included abandonments, as well as extensions, but it does not. To our mind this is sufficient

to answer the argument that the State is excluded from any activity by the provision quoted from paragraph (20), but that is not all.

The language employed in paragraph (20), towit: "without securing approval other than such certificates," is not the language customarily used by Congress when it excludes the authority of a State to act, nor is it sufficient to overcome the effect of the language used in paragraph (17) relating to the same subject. From it we quote:

> "Provided, however, that nothing in this act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Certainly this language shows Congress recognizes, in the act, the police powers of the State. The interpretation sought by appellees, and that given by the court below, recognizes no vestige of right or power in the State, but, on the contrary, annihilates the subject of its control. It is our contention that to overcome this provision and strip the State of all rights in the regulation of its intrastate commerce and its carriers the language immediately following this must be at least as plain and clear as that usually employed by Congress to exclude the State's authority in legislation on the same or similar subjects.

Congress has used language to exclude State authority both prior to and subsequent to the passage of the statute under discussion. When the country was involved in war and it became necessary that a central power should take charge of and control the commerce of the country without interference and when time was the essence of its power, when it became necessary that the State should surrender every right which it had to the central government, the act was passed giving to the President such power. Small limitations were placed upon his authority, but Congress,

composed of the representatives elected from the several States, was careful to preserve as far as possible the police powers of the States, and after making the provisions referred to, inserted a section reading as follows:

> "Section 15. That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulation of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war material, government supplies or the issuing of stocks and bonds." (Federal Control Act.)

The intention of Congress in the foregoing cannot be mistaken. The time had not arrived when Congress was willing, even in so great an emergency as the act required, to strip the States of their rights and police powers nor to infringe upon them except for the purposes stated, which were declared to be necessary during the emergency.

The emergency passed and Congress quickly returned to the carriers their property. We have referred to its interest in rehabilitation by the carriers of their property to the end that the commerce of the country be not crippled at an important period in its commercial history.

As a further aid to the carrier and to insure the rehabilitation of their property, and for the further purpose of securing the government in any indebtedness by the several carriers to the government, an act was passed providing for the issuance of securities to extend over a period not exceeding ten years for the purpose of refunding the carriers' indebtedness to the United States. This is expressed in Section 207 of the Transportation Act. It was necessary that such indebtedness be refunded regardless of the requirements of any State. The indebtedness had been made. They had been made during an emergency when a State could afford to forego its rights and suspend its police powers for the

common good. That the government may be able to lend a further helping hand and the commerce of the country properly protected, it was necessary that security be given for such indebtedness and the power of the State to prevent it was excluded. The language used by Congress for this purpose cannot be mistaken. We copy the language as follows:

> "(g) A carrier may issue evidences of indebtedness, pursuant to this section, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

Further providing for the carriers in this respect, Congress created a revolving fund to be used in making new loans to railroads. Such new loans may be necessary in order to provide equipment, betterments and extensions to meet the conditions arising with the close of the war and in order to conserve the interest of the general public. An emergency is here seen as in the foregoing, and Congress again uses language similar to that quoted above and which cannot be mistaken. We quote from Section 210:

> "(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

If, during the great emergency existing, which called for the operation of the railroads of the country by the central government to the exclusion of the owners, Congress saw fit to preserve the police powers of the State, so far as was possible for the period of this emergency when it may be presumed that all the State's authority has been superseded, and if after its return, the acts were passed as referred to, which necessitated the power of the State, with reference to the issuance of securities, be superseded, Congress deemed it necessary in order that the authority of the

State be excluded to say so in plain and unmistakable language, should, then, this court feel called upon to construe the language as contended by appellees with reference to abandonments by carriers of the lines so as to exclude the authorities, the police powers of the State, when such exclusions are not necessary to meet the ends in view in passing the enactment, particularly in view of the distinctions made by the wording of the act between the powers of the Commission to order abandonment and its power to compel extensions?

We submit in the light of reasons given and the language quoted that Congress did not intend by the act, and that it does not exclude the authority of the State, but that the full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation and to which it owes its existence and with which it has a charter contract and obligation.

The Act as Interpreted Confers Judicial Authority Upon the Interstate Commerce Commission.

It has been held by this court that the Interstate Commerce Commission is not a court created under the Constitution, and that it cannot be given judicial authority. As interpreted by the Interstate Commerce Commission, subdivisions (18) to (22) of Section 1, confer upon the Commission judicial authority. Acting upon such interpretation, the Interstate Commerce Commission issued what is denominated its certificate of public convenience and necessity authorizing appellee to abandon its road after having adjudicated what is recognized to be the interest of appellant and the obligations of appellee to appellant by determining the issues raised under the application for the certificate of public convenience and necessity. The proceedings in this regard were

judicial in form, as well as in fact. Upon the filing by appellee of its application alleging its corporate existence, the purpose of its organization, its losses for a period of time and its inability to make money in the future, notice was given to the State of Texas, as a party defendant, by serving notice upon the Governor of the State and also by publishing notice to unknown interested parties. Answer was filed and the questions of fact alleged, upon which appellee sought its certificate, were contested. They were questions of judicial ascertainment, not for future prospects in determining necessary and adequate rates, but of present condition and status to determine whether or not appellee should be compelled to comply further with its contract, or whether or not the circumstances existed which would relieve it from further obligation. It pleaded in its behalf its financial condition and alleged that to further require it to operate would be to take its property without due process of law and would be confiscatory and unreasonable; and further, that it is a burden on interstate commerce and was under the law authorized to abandon its contract, its operation under the laws of the State of Texas, and comply with the Federal law, the paramount law of the land, applying in this case. Upon this pleading the Interstate Commerce Commission adjudicated the facts and found in its order (Exhibit "A," page 53, and Exhibit "B," page 58, Record) that facts existed as alleged by appellee in its application and against the facts alleged by contestants. The decree was entered as shown in Exhibit "B," the two constituting a judgment and decree in form, purpose and effect. Upon this decree, it is asserted by appellee that all rights of the State of Texas and of its citizens have been finally adjudicated; that the district court trying this case had no jurisdiction to hear and determine the cause, which made a collateral attack upon such judgment, order and decree. The trial court found for appellee and declined to hear the testimony offered by appellant.

If Congress has provided for the judicial ascertainment of these

questions, then the due process clause of our Constitution has not been violated. Such is the contention of appellee, but it has been held, as stated, that the Interstate Commerce Commission is not a court created in accordance with the provisions of Sections 1 and 2 of Article 3, Constitution of the United States. That being true, appellant is entitled to have the questions presented adjudicated by a court of competent jurisdiction and its rights and interests under the charter of appellee and the laws of the State of Texas in the corporation which it has created, properly determined.

As we view it, the things done by the Interstate Commerce Commission in this case are purely judicial. In Prentis vs. Atlantic Coast Line, 211 U. S., 210, Mr. Justice Holmes, writing the opinion, held that certain acts of the State Corporation Commission of Virginia were judicial and others legislative. We quote from the opinion:

> "There is no need to rehearse the provisions * * * that add judicial to its other functions, because we shall assume that for some purposes it is a court * * * and in the commonly accepted sense of the word."

After holding that it has been given powers by the Legislature under the Constitution of Virginia to regulate and control public service corporations and was clothed with the legislative, judicial and executive powers, Mr. Justice Holmes then discussed these powers and observed that such powers can only be granted to one body with the sanction of the Constitution under which the legislative body acts. Defining judicial functions, the justice says:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power * * *.

"Proceedings legislative in nature are not proceedings in a court. * * * no matter what may be the general or dominant character of the body in which they may take place. The question depends not upon the character of the body but upon the character of the proceeding."

Chief Justice Fuller, concurring in reversing the decree of the lower court, but dissenting from the opinion, observes nevertheless:

"It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, * * * against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission as prescribed by law were in every respect the same as those of any other judicial court of record. It issued, executed and enforced its own writs and processes; * * * and kept a complete record and docket of its proceedings; it summoned witnesses and compelled their attendance, and the production of documents; it ruled upon the admissibility of evidence; * * * and its judgments, decrees and orders had the same force and effect as those of any other court of record in the State. * * *."

Justice Harlan dissented from the opinion, but agreed that the proceedings were judicial. The very language of the opinion, in this case, so far as it discusses the judicial attributes of the Virginia Commission, are applicable to the Interstate Commerce Commission since it has assumed the authority, under the Act of

1920, and issued its order, judgment and decree denominated a "Certificate of Public Convenience and Necessity" authorizing the abandonment by appellee of its operation under its charter and the laws of the State of Texas.

In the same manner that the Virginia Commission acted, so the Interstate Commerce Commission, after giving notices as herein stated, appointed a commissioner to hear the evidence and report such evidence to it as to a court. A date for hearing was determined and the party defendant notified. Testimony was taken on the controverted issues and reported to the commission after which the parties at interest were directed to appear, file their brief and make argument upon the law and the facts. Thereafter the opinion was entered upon findings of fact and conclusion of law by the Interstate Commerce Commission, which opinion differs from an ordinary judgment and decree, not in verbiage, not in form, not in effect, but only in the name that is given it, "A Certificate of Public Convenience and Necessity."

In all respects the proceedings, provided by the Act referred to and especially Sections (18) to (22) are judicial. The questions to be determined were matters properly of judicial ascertainment and appellee contends that the "certificate" issued thereunder is a final judgment and decree which can only be attacked by procedure prescribed which is in effect an appeal with trial de novo under the Adjective Law of the United States.

If the acts of the Interstate Commerce Commission, under the section referred to, are judicial, the sections are unconstitutional. This is determined by the matter at issue before them and its nature and not the nature of the Interstate Commerce Commission. The proposition is settled that it is merely a committee from Congress, acting for and in its behalf; that it is not a court and can not exercise judicial functions and though contrary provision be made by Congress, its acts, when judicial in fact may

be attacked in any court in any proceeding because illegal and void. Congress can give the Interstate Commerce Commission no power which it does not have itself. The Interstate Commerce Commission can, therefore, have no power except that which is legislative and administrative in its nature and any act conferring upon it judicial attributes and power is unconstitutional and void and any act which the Interstate Commerce Commission performs or any of its judgments, orders and decrees thereunder are likewise without effect and are illegal and void.

THAT A CHARTER CONTRACT, OR FRANCHISE IS A BINDING OBLIGATION UPON THE CARRIER, UNLESS FOR REASON FOUND DEFECTIVE, IS CONCEDED BY THE DECISIONS OF THIS COURT.

In the recent case of City of San Antonio et al. vs. San Antonio Public Service Company, decided on April 11, 1921, and citing the case of San Antonio Traction Company vs. Altgelt, 200 U. S., 304, a franchise granted to the city of San Antonio was held to be defective as a contract because the city was forbidden, under the Constitution of the State, from entering into such contract. It was, therefore, held to be unilateral. The same process of reasoning followed in this case would conclude in the case at bar that the charter of appellee, granted by the State of Texas, conforming to the Constitution of the State and complying with the statutory laws, is a binding contract. It is binding upon the State of Texas, it is also under the same process of reasoning, binding upon the appellee. If binding upon the appellee, it cannot escape the judgment of the court.

THE STATE CAN CONTROL PHYSICAL PROPERTIES OF ITS CORPORATIONS.

The lawful powers of a State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with

its amendments, and the laws of the State which enter into and become a part of such charter contract so long as such action does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarass exercise by Congress of any power with which it is invested by the Constitution. (B. & O. Ry. vs. Maryland, 21 Wallace, 456-473; Northern Securities Co. vs. United States, 193 U. S., 347.)

The Eastern Texas Railroad Company has a charter contract with the State of Texas by which it agreed to operate its line of railroad for a period of twenty-five years, beginning November 1, 1900. The road is situated wholly within the State of Texas and its charter authorized it to do business as a common carrier within the State of Texas and further authorized it to receive freight and passengers from connecting lines without designating whether such freight and passengers should be interstate freight and passengers or not. The charter also adopted all laws that may be passed by the Legislature of the State of Texas in regulating common carriers doing business wholly within the State, and by the terms of such laws they became a part of its charter contract.

At an early day, and before the building of steam railroads, Chief Justice Marshall wrote the opinion in Gibbons vs. Ogden. He recognized then the rights of the State to regulate its internal commerce and this recognition was expressed and repeated in words directly to that effect. This court has ever followed this opinion. So far as we know, no part of it has ever been set aside. It is quoted by appellee with approval. We call attention to the fact that in this opinion the court recognized the right of the State to control the physical properties of carriers within its bounds though they have engaged in interstate commerce. On page 203, in summarizing a mass of legislation not surrendered

to a general government, and which it was observed could be most advantageously exercised by the State itself, the Chief Justice included among them "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those with respect to turnpike roads, ferries, etc." What was the relation, at that time, of turnpike roads and ferries to interstate commerce? They are practically extinct at the present day and time and have been superseded by railroads and railroad bridges. No more are the physical properties of the railroad today the instruments of commerce than were turnpike roads and ferries at the time Justice Marshall wrote this opinion. On page 206, asserting the supremacy of Congress to legislate, he limits it "so far as may be necessary to control" State laws, "for the regulation of commerce." On page 208, however, he acknowledges the power of a State to regulate its police, its domestic trade and to govern its own citizens, including of necessity the corporations created by it, which power to regulate gives to the State the power to legislate to a "considerable extent." If to the State is reserved the power to regulate, it must then follow that Congress does not have the power with respect to the same subject to annihilate or exterminate.

It is not the contention of the State of Texas that it can enforce the provisions of this contract when same embarasses the Federal government in the enforcement of any of its laws passed in accordance with its Constitution and particularly laws in regulation of interstate commerce. It is the position of the State, however, that when the Federal government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. The road ceases to be engaged in interstate commerce and its physical properties are of a nature that it is henceforth beyond

the power of Congress to exercise any influence over it. Congress has no power of extermination. There is no harm in the physical property itself that gives to Congress the power to exterminate it when it has been released from its obligations to the Federal government by the withdrawal from it its privilege of carrying the mail, and receiving interstate passengers and freight. Corporate obligations are in no manner affected, and it must then apply to the State which created it, who alone can give authority for its abandonment.

It is within the conception of practical business men that the carrier, though withdrawing from interstate commerce, may yet serve a useful purpose to its State and comply with the obligations which it assumed to the State creating it. It must, therefore, be a matter of judicial ascertainment before there is an authority who can say the contractual obligations to its State have been performed and such judicial ascertainment must be founded upon the facts properly pleaded before a court of competent jurisdiction created either by the State or by Congress in accordance with its power under the Constitution to create courts.

This court has frequently held and particularly in Louisville & Nashville Railway Co. vs. Kentucky, 161 U. S., 677, 702, that it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police power. This case recognized that to the States belong the power to create and to regulate the instruments of such commerce as far as necessary to the conservation of the public interest. It quotes with approval former holdings of the court to the effect that Congress could not limit the power of the States to create corporations, define their purposes, fix the amount of their capital and determine who may buy, own and sell their stock. (Quoted with approval in Northern Securities Co. vs. United States, supra.)

Would any force be added to this if the court had said that the States have power to fix the time in which the corporations which they create shall live? Is it not true that the Federal government, in the exercise of authority whereby the corporation is destroyed would take from the State, in the self-same act, all the authority conceded to it under its police power to create, fix the purpose, amount of capital and determine who may buy, own and sell the stock of its corporations? Could it not, in the next instant, after the creation by the State of a corporation defeat its action by ordering its destruction and would not such destruction effectively deny to the State all of its other powers of regulation?

That the State has a commerce purely internal, not mixed with interstate commerce and having such limited influence over interstate commerce as to relieve it from the regulation of the Federal government, has been continually recognized by Congress and by all the courts. From the court's opinion in Northern Securities Co. vs. United States, supra (page 349) we quote this language:

> "The regulation or control of purely domestic commerce is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress."

Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce? Would it not be as reasonable to say that Congress can exclusively regulate the commerce of a nation without any power to regulate the instruments of such commerce, and is it not by the same process of reasoning that Congress is given any power whatever to regulate or control, in any manner, the instruments of interstate commerce? The reasoning applying to one applies also to the other, and it would be fallacious to conclude that the time has arrived, or will arrive, when the State has no commerce except that which is co-mingled with and becomes a part

of interstate commerce; that though it can regulate its intrastate commerce, and though it may create the corporations which are to carry it on and give such corporations life, it cannot determine the number of their years. That its creatures whose purpose is determined by it and whose contracts are recorded in its archives, can, in the exercise of a privilege which it gives also in interstate commerce, abstract from the State all power which it had under it and defeat the State in all of its rights, under the Constitution of the State, under its laws and under the terms of its charter, while the carrier at the same time claims the privileges and immunities which its creator gives. For is it not a proper conclusion that in the event the Federal government directs the abandonment by the carrier of its property, directs its sale and disposition, that it thereby withdraws it from every vestige of power which the State has over it under its police power or authority? The State, in such event, must stand by with folded arms, stripped of every power which the Constitution of the United States guarantees to it and which it has heretofore exercised without dispute from any source and see the creature of its creation exterminated. It is not conceivable that the constitutional provision granting to Congress the power to regulate commerce gives to it such power superior to the guarantee which that same Constitution directly gives to the States ratifying it, and that, through any broadening of the powers under such condition, through judicial interpretation, should the Congress be permitted to annihilate the privileges guaranteed to a State, in the pretense of exercising remotely its authority to regulate commerce. We repeat that there is no contention upon the part of the State of Texas that it has power to endow its corporations with authority to restrain interstate commerce or international commerce to disobey the national will as manifested in legal enactments of Congress, but with this same thought we reassert under a full assurance from the decisions of the courts that when the Interstate Commerce Commission gave

the Eastern Texas Railroad Company its authority to abandon its engagement in interstate commerce, it reached the full power of Congress under the Constitution and the right of the State of Texas to compel the continuance by the defendant, appellee here, of its engagement in intrastate commerce in no manner embarasses the Congress in the exercise of its legal rights and no further affects interstate commerce than does each and every individual, occupation or profession which produces goods for shipment or demands in any way or furnishes patronage to interstate commerce. It can do no more than produce, at the point of contact with interstate carriers, freight and passengers which may be delivered to them for transportation and which they, under the rules and regulation of the Interstate Commerce Commission may or may not receive. Does not the farmer who raises his products in this vicinity and hauls them to market do as much? To be mentioned also are the manufacturing plants, including saw mills, brick kilns, foundries and other industries at the particular point in question as well as mines and quarries, each producing articles for transportation to be received under the rules and regulation of the Interstate Commerce Commission, because their products are to be transported, and can it be said that they and each of them so affect interstate commerce and, regardless of their nature, they may be regulated or exterminated at the will of Congress or of the Interstate Commerce Commission when so directed by Congress?

Quoting again from the decisions of this court, in Atlantic Coast Line Co. vs. North Carolina Corporation, 206 U. S., 1, it was said in the opinion:

> "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not

be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Chief Justice White quoted this with approval in M. P. R. R. Co. vs. Kansas, 216 U. S., 262, and commenting thereon held that acts of the State in compelling the running of a train within the State by a railroad engaged in interstate commerce, incorporated by another State, that unless for some reason the order must be treated as such an arbitrary and unreasonable exercise as to cause it to be in effect not a regulation but an infringement on the right of ownership or circumstances considered as operating a direct burden upon interstate commerce, the State's order must be complied with, thus holding the action of the State within its police power. Conceive, if you can, the right of a State to force the running of trains by a road within its territory which is incorporated under the laws of another State and, at the same time, this State would be denied the right to enforce the contractual obligation of such carrier to operate trains at all. When we have reconciled this thought with proper reasoning based upon such decisions of our courts, then we may properly concede that Congress has the power claimed by it and exercised by the Interstate Commerce Commission in authorizing and directing the abandonment by the defendant of its operation and the sale and alienation by it of all of its physical properties within the State of Texas.

In the case at bar, we are not left to indulge in uncertain implications for the reason that appellant is protected in all of its contentions by a charter contract whose words are definite, the purport of which appellee makes no effort to deny. There is read into this charter a previously adopted constitution and under it previously enacted statutes.

The contract guarantees the operation of trains on appellee's line of railroad for a period of twenty-five years. That time has not expired. The constitutional statutes referred to forbid the

abandonment of operation by all common carriers without the consent of the State of Texas, regardless of whether this period of time has expired or not. The enforcement of this contract by appellant does not preclude the Interstate Commerce Commission from withdrawing from appellee all patronage of interstate commerce and, therefore, imposes no burden upon interstate commerce. We therefore insist that the power to order the abandonment by appellee of its line of railroad does not lie with Congress nor with the Interstate Commerce Commission.

THE CORPORATE STATUS OF APPELLEES.

In the report of the Interstate Commerce Commission attached to appellees' supplemental motion to dissolve injunction (Exhibit "A," Record, page 53) the Commission found that after the incorporation of the Eastern Texas Railroad all of its outstanding stock was acquired by the St. Louis Southwestern Railway Company, which except for the directors' qualifying shares, still holds it. It further found that there is substantial identity between the officers of the Eastern Texas and the Southwestern, and that the two roads had twice endeavored to consolidate since the stock was purchased by the latter and were prevented from doing so by the refusal of the Texas Legislature to grant its consent, without an extension being made to Crockett, the original destination. This finding is a part of the pleading of appellee and brings us to the conclusion that though the Eastern Texas retains its corporate name, it has lost its corporate identity; that though its obligations to the State of Texas have not been fulfilled, it has nevertheless become a part of the system of the St. Louis Southwestern Railway Company and is subject to all of the laws of the State and of the United States governing it as a part of the system of the St. Louis Southwestern Railway Company.

In substantiation of our views, we refer to the case of Chicago, Milwaukee & St. Paul Ry. Co. vs. Minneapolis Civic and Commer-

cial Association, 247 U. S., 490. Mr. Justice Clark wrote the opinion of the court, and after stating the facts which showed that plaintiffs, two railway companies, had purchased the stock of the Minneapolis Eastern Railway Company and were operating it, electing its directors and shaping its policies, said:

> "Thus, the question presented for our decision is whether the Eastern company, in form a corporate entity, separate and distinct from the Milwaukee and Omaha companies, is in reality an independent carrier, exercising an independent control over the road to which it holds legal title and over the conduct of its business affairs, or whether it is a mere agency or instrumentality of the two corporations which own all of its capital stock. * * *
>
> "* * * the Milwaukee and Omaha companies came into exclusive control of the corporation and a board of directors satisfactory to them was elected."

Other facts were found by the court showing that the Eastern company was controlled in all of its policies by the other two railroad companies, who elected the superintendent as well as its directors, the same as is alleged in appellant's bill in the court below. Upon findings the court thereupon announced this legal conclusion:

> "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is, and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it." * * *

The above opinion was concurred in by the entire membership of this court and is the law now. The facts of ownership were similar to the facts of the case at bar and differs only in that

two companies bought its stock, while in the instant case there is but one purchaser which, according to the allegations of appellant and undenied by appellees, operates the company whose stock it purchased as a part of its own system, using the same officers, agents, auditors, superintendent, president and treasurer.

We repeat the words of the justice writing the opinion:

> "It is sheer sophistry to argue that because it is technically a separate legal entity, the Eastern (Texas Railroad) Company is an independent public carrier, free in the conduct of its business from the control of the company which owns its capital stock, furnishing its officers and electing its directors."

Standing before the Interstate Commerce Commission, the case was properly the St. Louis Southwestern Railway Company applying for a certificate of public convenience and necessity authorizing it to abandon operation of a part of its main line track and dismantle and dispose of same.

Cannot Abandon Part of Line.

The Interstate Commerce Commission has no authority under the statute to grant to a railroad company a certificate of public convenience and necessity authorizing it to abandon a part of its main line track in the absence of a showing that the entire system was losing money. Appellant pleaded this fact in the court below (Plaintiff's Supplemental Petition, Record, page 11), but the testimony on this plea was refused by the trial court.

The Puget Sound Traction Co. vs. Reynolds et al., 244 U. S., 574, is a case in which a street railway company had acquired the capital stock and control of three other systems. The company sought to charge separate fares on the different sections of its system, being that which had been purchased by it and brought under its management. The proceeding was to compel it to grant transfers from its main line to its purchased lines, or either of

them, and the company alleged a loss on the business of each of its three branch lines and pleaded a violation of the Fourteenth Amendment declaring that to require it to give transfers would be a confiscation of its property in violation of this amendment. The court declined to consider each company separately, but declared all of them to constitute one system, and, in determining the plea of appellant, defendant below, the earnings of the entire system was inquired into. Mr. Justice Pitney, writing the opinion of the court, said:

> "But we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the Fourteenth Amendment is to be determined with reference alone to the Alki, the Fauntleroy or the Ballard Beach Lines. These are and long have been operated by plaintiffs as parts of a system comprising two hundred miles of tracks."

The court, in this case, merely followed former decisions, and its decisions in this and other cases have been closely adhered to by the States. In view of the pleadings of appellant in its amended bill and of the answer of appellee and particularly in its exhibit referred to above, we submit that the doctrine above stated applies.

The Eastern Texas Railroad has become the mere agent or instrumentality of the St. Louis Southwestern Railway Company and the Interstate Commerce Commission is without authority of law to issue the certificate of public convenience and necessity authorizing its abandonment in the absence of a showing that the entire system is losing money, and that the abandonment by it of the sections of the system in question would relieve its distressed condition.

GENERAL SUMMARY.

Appellant's Assignment of Error No. I.

In the light of proper construction of the statute and placing upon same the proper interpretation; in view of the admitted facts in appellees' pleading and the charter contract with the State of Texas; in view of the corporate status of appellee and its association as part of the system of the St. Louis Southwestern Railway Company; and considering the police power reserved to the State to control the physical properties of its corporations, appellant's assignment of error No. I should be sustained.

Appellant's Assignment of Error No. II.

Appellant, plaintiff below, having brought this suit on substantial issues, defendant could not thereafter create its defense by producing the order from the Interstate Commerce Commission and upon same move the dissolution of the injunction. Being in court upon substantial issues, appellant was entitled to be heard and to attack the certificate collaterally as illegal, unconstitutional and void for the reason and upon the grounds herein discussed. Appellant was, therefore, entitled to be heard on the facts attacking the findings of the Interstate Commerce Commission upon which it issued its certificate as a basis for its allegation that the certificate was contrary to law. Appellant's assignment of error No. II should be sustained.

Appellant's Assignment of Error No. III.

For the reason that Congress has no authority to pass an act taking from the State its right to control the physical properties of its corporations in the absence of a conflict between such con-

trol by the State and the rights of Congress under the Constitution; and for the reason that the interpretation of Subdivisions (18), (19), (20) and (21) of Section I of the Act of February 28, 1920, giving the Interstate Commerce Commission authority to order the abandonment of railroads, makes that body a judicial tribunal without being constituted in accordance with the Constitution, the sections of the act are unconstitutional and any orders made in pursuance thereof are illegal, unconstitutional and void. For this reason appellant's assignment of error No. III should be sustained.

Appellant's Assignment of Error No. IV.

For the reason stated in the argument and because Congress did not intend to give the Interstate Commerce Commission the power exercised, as shown by the wording of the act interpreted in the light of other acts of Congress, the court erred in holding that the Interstate Commerce Commission had authority, under the law, even though it be constitutional, to issue the certificate of public convenience and necessity alleged and, therefore, appellant's assignment of error No. IV should be sustained.

Conclusion.

The decree of the district court dissolving the injunction should be reversed and an order should be entered upon the admissions in appellee's answer perpetuating the injunction granted by the district court for the Fifty-third Judicial District of Texas.

In the alternative, and in the event the court should find it has no authority to perpetuate the injunction upon the pleadings in the case, the decree of the district court should be reversed and the temporary injunction granted by the district court for the Fifty-third Judicial District of Texas should be reinstated pending a hearing and the district court directed to hear the case

upon the pleadings without consideration for the order of the Interstate Commerce Commission directing the abandonment of appellee's line of railway.

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Austin, Texas, September 17, 1921.